

Hawaiian Islands Humpback Whale National Marine Sanctuary Advisory Council

Wednesday, April 17, 1996
9:30 am - 4:00 pm
Honolulu Interisland Terminal
Ohia Room #1, 7th Floor

Meeting Minutes

Attendance

SAC Members present: Maile Bay, Hannah Bernard, Stan Butler, Herman Chong, Jr., James Coon, Beth Goodwin Goodoni, Walter Haas, June Harrigan-Lum, Louis Herman, Thelma Kia-Shimaoka, Greg Kaufman, William Lennan II, Donna Liddicote, Craig MacDonald, Paul Nachtigall, Michael Neininger, Gene Nitta (for Jim McCallum), Francis Oishi, Gregory Pai, Jan Pinney, Bob Schroeder, Claud Sutcliffe, Skip Weinstein. Excused: Keoni Fairbanks and representative from Department of Education.

Others present: NOAA: Allen Tom, Naomi McIntosh, Jean Souza, Michael Weiss
OSP: Dick Poirier, Brian Burnett, Roy Catalani.

DBEDT: Athline Clark

DOT: Glen Soma

Public: Chris Evan, Patrick Gajdys, Scott Hamilton, Gerald Hagino, Jim Housh, Tim Hurley, Bill Mustard.

Distributed Materials

- Revised Agenda
- SAC Charter Amendment #1
- Draft Summary of DEIS/MP Comments (Ranges of Alternatives)
- Draft SAC Membership list
- SAC election provisions and procedures

Review of SAC Charter

Following welcoming remarks and introductions, Michael Weiss, NOAA-Attorney from Silver Spring, Maryland opened discussions on proposed revisions to the SAC Charter.

1. Members and Chairs -- The SAC charter was amended to reflect that the Council will consist of 24 voting members and one non-voting member from the National Marine Fisheries Service (NMFS).

2. Removal from Council -- The SAC charter was amended to waive the requirement of Council members to attend three consecutive meeting, only until such time that the Final Environmental Impact Statement and Management Plan (FEIS/MP) is finalized.

3. Meetings -- Until such time that the FEIS/MP is finalized, the Council shall meet as frequently as deemed necessary by the Sanctuary Manager and the Chair. After the approval of the FEIS/MP the Council shall meet as frequently as necessary, not to exceed once per month but at least once every six months.

4. Alternates - Discussion over whether or not the SAC charter would be able to allow alternates for non-government SAC members. Several points regarding alternates were raised. A sub-committee was formed to address these points and a reporting of the group's findings and recommendations will be presented at the next SAC Meeting. The subcommittee consists of Hannah Bernard, Claude Sutcliffe, Jan Pinney, Skip Weinstein, Lou Herman, and Stan Butler.

DEIS/MP Discussions on the Comments

Dr. Greg Pai led the discussion on the review of comments on the DEIS/MP. The purpose of the discussion was to allow the Council to focus on those comments received during the public comment period on the DEIS/MP that may not have been addressed in the DEIS/MP. These comments are identified on the Draft Summary of DEIS/MP Comments (handout) by asterisks.

A. Boundary

1. Harbors (Comment 1 and 3) -- This discussion over comments 1 & 3 covered the future expansion of harbors; harbor exclusions; water quality within marinas; water quality within harbors and marinas and possible impact on whales; impact of whales on harbors and on the ability for boats to operate within the harbors when whales enter these areas; the application of the Marine Mammal Protection Act and Endangered Species Act within harbors and in harbor areas; and guidelines on how vessels should approach whales within harbors or near harbor areas.

Army Corp of Engineers (ACOE) -- expand exception to harbors and state anchorages; get list of designated anchorages from the State.

Question raised as to why any harbors should be excluded.

Comment that the State Ocean Resource Management Plan (ORMA) is not considered in the DEIS.

2. Boundary Alternatives (Comment 2) -- The Council looked at a wide range of comments regarding the boundary alternatives for the Sanctuary including: distribution of whales in windward areas and leeward areas of the Hawaiian Islands, consideration of other species; relationship of the boundary to the protection of whales; the preference of humpback whales for shallow areas and Kilauea Point.

Greg Kaufman: Not necessarily true that whales are only found on the lee side of the islands.

Skip Weinstein: Sanctuary may include other resources so do not exclude windward side.

Hannah Bernard: Don't expand to 1000 isobath; don't exclude windward; if boundaries are statewide, then include Niihau, Kaula Rock, no military or harbor exclusions.

Lou Herman: There is a misconception that whales prefer the leeward side of the islands. Rather, it is the expansiveness of the shallow water habitat that is key.

Claude Sutcliffe: Better not to carve up the boundary; too confusing.

3. Approaches and off-shore anchorages (Comment 3) -- Comment that harbor exemptions should include offshore anchorages.

Impacts of offshore anchorages on whales needs to be studied.

Need provision to allow vessels to get out of the way of a whale.

Support for exempting approaches to harbors.

Question raised as to how far out should such an exemption be extended.

ORMA rules: designated permanent offshore anchorages established; other anchorages have a 72 hour limit; no anchor zones.

4. Zoned boundary (Comment 4) -- Comment 4 advocated for a zoned boundary. The DEIS/MP does not contain any proposal on a zoned boundary for the Hawaii Sanctuary. Statements made by Council members is that zoning would just create more confusion on the boundary.

5. Inclusion of the high-water mark in the boundary alternatives (Comment 5) -- The Council made several comments in agreement with the inclusion of the high water mark.

Land use activities generate turbid plumes which have a potential to impact whale habitat.

Whales do get very close to shore.

Should have a boundary that is easily defined

High-water mark is where ACOE regulatory jurisdiction begins.

Whale carcasses are also protected.

6. Manageability (Comment 6) -- The Council was not able to come up with a definition of a manageable boundary vs. a unmanageable boundary. The Council recognized that a definition would need to consider management activities and goals; and budget. ACOE suggested that 1000 fathom isobath would be difficult. NMFS stated that a lot depends on management goals; education can be about the entire 200 mile EEZ. Ease of understanding and user friendliness are manageability components.

7. Submerged Ceded Lands (Comment 7) -- The Council discussed the issue of submerged ceded lands. Francis Oishi stated the term submerged ceded lands is defined by law and is managed by DLNR with a boundary limit up to 3 miles. It was also noted that the State does not have ownership title over ceded lands and the submerged ceded lands also entitles Office of Hawaiian Affairs (OHA) to 20% of any revenues from the use of those lands. The Sanctuary does not change the present ownership of ceded lands. It will include those areas but NOAA does not get ownership. William Tam (Attorney General) confirmed that the Sanctuary will not involve a transfer of title, and pointed to the fact the Endangered Species Act and other laws have not resulted in any changes regarding submerged ceded lands. The Council requested that NOAA provide more information regarding this issue.

8. Kahoolawe (Comment 25) -- The Council discussed public comments on Kahoolawe. Greg Kaufman asked why Kahoolawe was exempted from the Sanctuary. Aerial surveys show that the waters around Kahoolawe showed a high density of humpback whales. Kahoolawe should be included in the Sanctuary especially since the Sanctuary was designated by a study around the island. Mr. Weiss, explained that the Secretary of Commerce certified to Congress that Kahoolawe was not suitable for inclusion primarily due to the unexploded ordnance in the area. It was also noted by a Council member that Kahoolawe is also exempt from NEPA and other laws due to its special situation.

9. NOAA's preferred boundary alternative (Comment 9) -- The Council initiated a discussion over exclusion areas contained in NOAA's preferred boundary alternative.

Walter Haas stated that NOAA's preferred alternative should not exclude exemptions for the military use areas, the argument given is not justifiable.

Beth Goodwin-Goodoni asked why did the waters have to be excluded; why couldn't the areas be included and military activities just be excluded? The boundary exclusion also excludes other non-military activities.

Bill Lennan asked if the Navy's concerns were perhaps habitat related and not activity related. The Navy is very active in the excluded areas and if the areas are included, the Navy is concerned about the future and how the Sanctuary will impact their activities.

Council members also question whether or not the areas which are excluded now could be included later. Mr. Kaufman felt that the boundary should be completely biologically based. It was suggested that the language on page 121 of the DEIS/MP should read "does not" instead of "fails to". Jim Coon pointed out that the scientific community agreed that the Sanctuary should include all waters out to the 100 fathom isobath. If Sanctuary is a good thing it should be shared if it is bad then everyone should have to deal with the results.

Dr. Louis Herman pointed out that the population of whales are increasing and areas which are not heavily utilized by humpback will be utilized in the future. Agrees that preferred alternative should be all waters up to 100 fathom isobath.

Herman Chong asked if it was the Sanctuary that we are looking at or is it economics. The whale is being used to achieve other purposes besides the stated purposes of the Act.

Statement that conclusions on page 120 are fallacious and loaded.

June Harrigan said the boundaries should reflect whale distribution (need statewide) .

B. Regulations

1. No new regulations unless approved by the SAC (Comment 1) -- The Council recognized that the law does not give them the authority to approve any new regulation the Sanctuary may propose in the future. Although, it was noted by Mr. Weiss, that the Sanctuary is only proposing to incorporate existing restrictions under its preferred alternative in the DEIS/MP and any new regulations would go through the same process as the EIS/MP, including public notice and comment, and review and approval by the Governor. Mr. Lennan stated, that this should be stated throughout the document and that people need to be aware that you cannot make rules without a public review and Governor approval.

Fear of the future is greatest worry for fisherman, so it is important to clearly explain the process for future regulations.

2. Socio-economic impacts of future regulations (Comment 2) -- This comment dealt with whether or not socio-economic impacts of future regulations was considered by NOAA. Hannah Bernard pointed out that it may not be possible to identify the socio-economic impacts of future regulations that have not been identified at this time. Others concurred that this was difficult and speculative.

The Council requested more information on what happens to the Sanctuary if the population of humpback whales increases and is delisted as an endangered species?

Mr Kaufman stated, an increase in whale population does not decrease the need for a Sanctuary. Mr. Oishi added that under natural resource management laws as population increase you will see more interactions between humans and these animals and more management measures would most likely be needed.

Mr. Lennan felt that the process for making new rules should be outlined in the FEIS/MP, so everyone is informed about how new rules can be made.

Gene Nitta mentioned, that another option would be to have NMFS promulgate new regulation.

It was also noted that under regulatory Alternative #3 promulgates no independent, new regulations, however the Sanctuary can support existing enforcement efforts and to promulgate new regulations, there would need to be a basis and need for the that regulation.

Ms. Goodoni asked if existing regulations under MMPA and ESA were substantiated.

Mr. Nitta stated that yes, the best available scientific information was used to develop the 100 yard approach rule and also involved a public process.

Dr. Herman stated that the 100 yard approach rule was a result of making it easier for enforcement to prosecute harassment.

Ms. Goodoni asked if the Sanctuary will follow this type of procedural process to ease enforcement in developing new rules.

3. Permitting (Comment 3) -- Comment 3 asked how the Sanctuary will interface with other permitting agencies .

June Harrigan stated that DOH has been discussing the preferred regulatory alternative with NOAA. DOH's understanding is that NOAA is incorporating existing regulations and the only new aspect would be the increase of fines.

Dr. Craig MacDonald asked what NOAA envisioned as a party to review of permits and pointed out that under alternative 3, NOAA would be given new regulatory authority. Request that all MOU's with the various regulatory agencies be presented to the SAC's.

Mr. Weiss clarified that SRD has no approval authority over these certain permits. NOAA will instead work internally with the permitting agency to review the permits in the time allotted for the permit review and provide recommendations or comments within those conditions only.

Mr. Kaufman stated, that NOAA needs to define clearly in MOU's how the Sanctuary would work with these permitting agencies and that the public needs to understand that OSP had effectively neutered the Sanctuary some time ago.

Mr. Lennan asked, if a condition of a permit had been violated or if an activity was conducted without a needed permit, would these actions now be a Sanctuary violation and if the permitting agency does not take action against the violation then the Sanctuary would?

Mr. Weiss stated that NOAA would likely defer to the permitting agency.

The Council requested that the Sanctuary clarify the types of discharges and alteration of the seabed activities the Sanctuary would be interested in reviewing. Because humpback whale habitat is undefined at the moment linkages between regulations and whale habitat may also be premature. Members of the Council felt that a definition of preferred habitat is available and should be referred to in the DEIS/MP. One way to alleviate the uncertainty would be to define what MOUs will be developed with the different agencies.

4. Existing education efforts (Comment 5) -- Comment 5 questioned if the Sanctuary recognized the existing efforts of the marine recreation and user community in education and self regulation. The Council had mixed responses to this issue. Some felt the Sanctuary could help with education efforts by building on existing efforts, others stated the Sanctuary needs to recognize the efforts of the marine recreation and user community, and some added that self-regulatory actions have not been undertaken by the community and a strong enforcement presence on Maui is what has helped to keep things under control. It was also stressed that enforcement needs to be education based.

5. Fishing Issues (Comment 27) -- Comment 27 asked if the Hawaii Sanctuary will end up with replenishment zones that will restrict fishing. Mr. Weiss pointed out that each Sanctuary is different and that the law designating the

Florida Keys National Marine Sanctuary had NOAA consider temporal and geographic zoning. He pointed out that should the Sanctuary want to ever establish zones, it would have to go through the full public process with the Governor's review.

C. Management Alternatives

1. Sanctuary should protect native Hawaiian gathering and fishing rights (Comment 1) -- The discussion focused on if it is presently within the authority of the Sanctuary to protect such rights. Mr. Kaufman stated that comment was made by those who saw the need to expand the scope the Sanctuary. Other statements were supportive of the protection of native Hawaiian gathering and fishing rights.

2. Depletion of bottomfish (Comment 5) -- The Council recognized that the State is currently involved in addressing this issue.

3. Enforcement and Penalties (Comment 30) -- Concern was expressed over the \$100,000 fine. Mr. Weiss explained that was the statutory maximum and that civil penalty schedules are developed for each Sanctuary that lists a range of fines for violations of Sanctuary regulations. Such schedules include increases in penalties for 2nd and 3rd offenses, and include aggravating and mitigating circumstances that can increase or decrease the penalty, respectively. Mr. Weiss stated that the schedules were available to the public. The Council recommended that the FEIS/MP more clearly spell out that a civil penalty schedule will be developed and made publicly available. The Council also recommended that the Sanctuary program request from the Office of Enforcement a range of penalties that have been assessed in other cases. Information regarding other fines that can be levied needs to be laid out as well. It also needs to be made clear that NOAA's systems of fines will not replace the State's system of fines.

Lt. Mike Neninger pointed out that every time a fine is levied it sets a precedent. If for example a fine is levied at \$5000 and the next time a similar violation occurs and a fine of \$30,000 dollars is assessed, the plaintiff who received a higher penalty would most likely file an appeal.

The Council expressed concerns regarding the economic value to the agency to assess higher fines and the escalation effect involving citations which are given to both boat owners and boat captains. There were also concerns expressed over what appeared to be flagrant violations this season around Maui due to the lack of enforcement presence on Maui, which was widely publicized and a need for increased "enforcement" but not necessarily increased "fines" or penalties.

It was pointed out that in some cases the economic value of a \$100,000 fine would wipe out the value of conducting the illegal activity. However, it was

suggested that the fines should make it unprofitable because otherwise the fines would be merely another cost of doing business.

Claud Sutcliffe summarized the groups discussion by commenting that the perceptions of reality are different. Some want to protect the whales, others don't. Some argue that there's too much enforcement and some say that there is almost none. Two very disparate views of reality.

The Council felt that clarification over the current status of the State marine patrol and NOAA's role in enforcement was needed.

D. Management Plan

1. Research (Comment 3) -- The discussion over comment 3 evolved in to a general discussion covering general research issues including funding, the need for research efforts regarding noise impacts to whales, and the importance of supporting research efforts.

Dr. Herman stressed the need to do more research on noise impacts on whales and on the importance of the whales acoustic environment.

In addressing the fear that increased research would lead to more regulation, Mr. Kaufman stated that increased research would lead to increased understanding and improve regulatory process where needed and should be stated in the DEIS/MP. The DEIS/MP also needs to be updated to reference studies which are ongoing by others.

Mr. Chong added that there was no funding information in the DEIS/MP. More information should be given on allocation of funding for the Hawaii Sanctuary and its related programs. Funds need to be identified now so we know what is feasible within this program.

Mr. Kaufman pointed out that other Sanctuaries have defined research programs and then looked for ways to fund it without imposing fees. Independent researchers have also sought and found ways to fund their efforts and sees the Sanctuary as a avenue to attract additional research funds to Hawaii.

Dr. Herman agreed that the Federal government has not given money to research and education for efforts that have been conducted thus far. The Sanctuary by endorsing research programs adds more credibility to these efforts and may attract funding for those reasons. Even with a track record is extremely difficult to get federal monies.

Dr. Nachtigall pointed out that monies for research programs are supported by building a reputation through peer-reviewed publishing of research in journals and encouraged researchers to publish their research.

Dr. Kaufman recognized that there are twenty organizations within Monterey that have sprung up as a result of their association with the Sanctuary.

Next Meeting

Dr. Pai closed the discussion on the review of comments on the DEIS/MP with the understanding that the Council will have an opportunity to finish the discussion at the next meeting starting with Management Plan comment 5.

The next meeting will be held on May 8, 1996 at the Honolulu Inter island Terminal Ohia Conference Room from 9:30 a.m. - 4:00 p.m.

Election of Chair, Vice Chair and Secretary

The Council elected Jim Coon as the SAC Chair, Dr. Paul Nachtigall was elected as Vice Chair and Hannah Bernard was elected as Secretary.

Public Forum

During the public forum, Jim Housh commented to SAC members that they should meet with their constituency before the next meeting.

Meeting adjourned

With no further business, the meeting was adjourned.